Dato Mohd Anuar bin Embong & Anor v Bank Bumiputra (M) Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO T–02–126–94
SITI NORMA YAAKOB, VC GEORGE AND MOKHTAR SIDIN JJCA
10 JANUARY 1997

Contract *— Breach — Damages — Whether bank foresaw that delay to discharge encumbrance on land titles would cause damage to land developer — Quantum of damages — Contracts Act 1950 s 74(1) & (2)*

The appellants purchased land with the intention of developing it. To finance the purchase and development, they applied for and was granted an overdraft facility by the respondent bank ('the bank'). The appellants later realized that they had insufficient funds to develop the land and applied to the bank by a letter dated 2 January 1983 for an extension of and increase in overdraft facility. The appellants reduced the number of buildings to be constructed on the land to 57 units of 16 two-storey semi-detached houses and 4 two-storey bungalows for Phase I, 28 two-storey terrace houses for Phase II and nine 3½-storey shop houses for Phase III.

On 28 March 1983, the overdraft extension was approved and an overdraft facility of RM2.5m was allowed, RM1m above the original facility. The extra financing was for the construction of the reduced number of buildings and was secured by the personal guarantees of the appellants and by a second legal charge over the same land.

The bank additionally agreed to release a total of 11 titles of the subdivided lots, six to the appellants unconditionally, and five to the government by way of compulsory acquisition. This agreement was not included in the 28 March 1983 letter from the bank. The appellants sent the bank a letter dated 26 April 1983 seeking immediate release of six titles without any redemption payment. The bank confirmed the request for release in a letter of 20 June 1983, and the titles were released to the appellants on 22 June 1983, but the encumbrances on the titles were not discharged. The bank ultimately did not discharge the encumbrances on the titles until May 1992.

Following the new arrangements with the bank, the appellants entered into a sale agreement with a third party on 29 May 1983 in respect of six titles, but the deal fell through because the bank failed to discharge its encumbrances on the land.

Four years passed before the appellants wrote to the bank on 11 June 1987 seeking the release of all 11 titles and the bank responded by instructing its solicitors in its letter of 13 June 1987 to prepare a discharge of the charges over the 11 titles.

A The appellants then entered into fresh sale agreements with different purchasers to sell the six titles between 16–20 June 1987. These sales were again aborted because the bank had failed to discharge the encumbrances on the land. The appellants were then sued by some of the purchasers.

B The appellants sued the bank for unlawfully withholding the discharge of the encumbrances on the titles, stating that this action had made it impossible for the appellants to raise sufficient bridging finance to complete Phase III of the project that would have assured them of profits over the project. The facility extended by the bank was only sufficient to complete Phases I and II. They argued that the C bank knew at the time they approved the new overdraft facility and agreed to release the titles, that this was to enable the appellants to finance the project and thus could foresee the resulting damage to the appellants if the discharge of the encumbrances was delayed. Additionally, the appellants argued that the letter of 20 June 1983 by D the bank should be read as an undertaking to release specific titles free of encumbrances. The trial court allowed the action and ordered that an assessment of damages be made.

The senior assistant registrar ('the SAR') determined that the bank had to pay the appellants RM3,401,820 for the projected profits that the appellants would have made but for the bank's failure E to discharge the charge over the 11 titles since 13 June 1987, an additional 30% of the projected net profits for the shame suffered by the appellants and 8% interest as well as costs. The SAR rejected claims for other damage allegedly suffered when the appellants were sued by various third parties, such as the architects, etc of the six F titles for sums allegedly due.

The bank appealed against the amounts assessed for the two heads of damages, and the appellants appealed against the dismissal of their claims for damages when sued by the various third parties. In the appeal, the High Court ordered on 27 August 1994 that the G appellants were entitled to damages following the bank's breach in delaying to perform its undertaking to release the 11 titles free of encumbrances, but that the measure of the damages based on the loss of profits caused by the delay was too remote or not proven. The bank's appeal was allowed, the order of the SAR was set aside, and the sum of RM5,000 was substituted as nominal damages suffered H by the appellants, with interest of 8% pa from the date of the order to the date of realization. The SAR's finding relating to the other damage suffered by the appellant at the hands of various third parties was affirmed.

The appellants appealed to the Court of Appeal on the adequacy I of damages found.

Held, dismissing the appeal:

(1) Section 74(1), (2) of the Contracts Act 1950 ('the Act') is based on the rule in *Hadley v Baxendale*. Section 74(1) covers the

situation where the damage suffered arises naturally from the breach. Section 74(2) covers the situation where the parties at the time of the contracting were aware that damage or loss is likely as result of a breach of the contract. Additionally, damages under either head cannot be too remote or indirect (see pp 653I and 654A–D).

(2) The harm to the appellants by the bank's delay in discharging the encumbrances was only to the extent that the appellants could not transfer the titles free of encumbrances. It could not go beyond this as the raising of additional funds did not involve and were not controlled by the bank. The appellants were free to raise funds by further charging the titles notwithstanding they were encumbered. The bank could not be expected to know how the appellants intended to raise the additional bridging finance (see p 655H–I); *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 distinguished.

(3) There was nothing wrong with the trial judge's finding that the properties in question increased in value between 1987 and 1992, as there was unchallenged evidence to this effect in the bank's valuation report. Hence, the loss of profits was not the natural and direct consequence of the bank's breach and the trial judge's finding that the compensation claimed under the first limb of s 74(1) of the Act was untenable should be confirmed (see p 656F–G); *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76 distinguished.

(4) Under the second limb of s 74(1) of the Act, the bank did not have special knowledge at the time of contracting of the likelihood of damage as a result of their failure to discharge the encumbrances on the titles. The 26 April 1983 letter mentioned why the appellants wanted the six titles released but failed to state that the reason for the sales of the titles was to raise additional funds for the project. The letter did state that the discharge must be made immediately, and the bank released the titles two days after its letter of 20 June 1983. The subsequent conduct of the appellants, for instance, waiting four years before writing to the bank again for the immediate discharge of the encumbrances supported the likelihood that the bank was initially mistaken as to the true intent and purpose surrounding the release of the 11 titles, and hence the bank was unable to foresee any loss that was likely to occur by the delay. Hence, the appellants could not base their loss on the second limb of s 74(1) (see pp 657E–G and 658B–F).

(5) The bank nevertheless failed to discharge the encumbrances for more than four years after the 13 June 1987 instruction to their solicitors, and must be accountable to the appellants for any loss or damage suffered by them during this period. The measure of such loss or damage could not extend to the loss of profit resulting from the appellants' inability to complete Phase III of the project because such loss was not the natural consequence of

the bank's breach and it was not foreseeable. Damages should be limited to nominal damages only, and the trial judge's assessment was correct (see p 658G–I).

(6) In any event, the appellants were under the burden of proving the amount of the projected net profit that was lost and they were unable to do so. Their feasibility report was lost in a flood and it was not up to the bank to produce this document. The appellants failed to call the maker of the report, and the witness called to lead the secondary evidence of the report was not qualified to do so, because there was no proof he had ever read the report (see pp 659B–D, I and 660A).

(7) The trial judge's decision that the other claims by the contractors, architects, etc were too remote to be claimed against the bank was correct. There was no proof that the claims of these third parties were due (see p 660I).

[Bahasa Malaysia summary

Perayu-perayu membeli tanah dengan tujuan untuk memajukannya. Untuk membiayai pembelian dan pemajuan, mereka membuat permohonan dan diberikan kemudahan overdraf oleh bank penentang ('bank tersebut'). Perayu-perayu kemudiannya mendapati bahawa mereka tidak mempunyai wang yang mencukupi untuk memajukan tanah itu dan membuat permohonan kepada bank tersebut melalui surat bertarikh 2 Januari 1983 untuk perlanjutan dan penambahan dalam kemudahan overdraf itu. Perayu-perayu mengurangkan jumlah bangunan-bangunan yang ingin dibina di atas tanah tersebut kepada 57 unit yang terdiri daripada 16 rumah sebandung dua tingkat dan 4 banglo dua tingkat untuk Fasa I, 28 rumah teres dua tingkat untuk Fasa II dan 9 rumah kedai 3½ tingkat untuk Fasa III.

Pada 28 Mac 1983, perlanjutan overdraf diluluskan dan kemudahan overdraf sebanyak RM2.5 juta dibenarkan, RM1 juta melebihi kemudahan asal. Pembiayaan tambahan itu adalah untuk pembinaan bangunan-bangunan yang telah dikurangkan jumlahnya dan dicagarkan dengan gerenti persendirian oleh perayu-perayu dan dengan gadaian kedua ke atas tanah yang sama.

Bank tersebut bersetuju sebagai tambahan untuk melepaskan sejumlah 11 hakmilik kepada lot-lot yang dipecah-bahagi, enam kepada perayu-perayu tanpa syarat, dan lima kepada kerajaan dengan cara pengambilan wajib. Perjanjian ini tidak termasuk di dalam surat bertarikh 28 Mac 1983 daripada bank tersebut. Perayu-perayu menghantar surat bertarikh 26 April 1983 kepada bank tersebut untuk mendapatkan pelepasan serta-merta enam hakmilik tanpa bayaran penebusan. Bank tersebut mengesahkan permintaan untuk pelepasan dalam surat bertarikh 20 Jun 1983, dan hakmilik-hakmilik itu dilepaskan kepada perayu pada 22 Jun 1983, tetapi bebanan ke atas hakmilik-hakmilik itu tidak dilepaskan. Bank tersebut pada dasarnya tidak melepaskan bebanan ke atas hakmilik-hakmilik itu sehingga Mei 1992.

Berikutan dengan pengaturan baru dengan bank tersebut, perayu-perayu mengikat suatu perjanjian jualan dengan pihak ketiga pada 29 Mei 1983 berkaitan dengan enam hakmilik, tetapi perjanjian itu gagal kerana bank tersebut gagal untuk melepaskan bebanan ke atas tanah itu. A

Empat tahun berlalu sebelum perayu-perayu menulis kepada bank tersebut pada 11 Jun 1987 untuk mendapatkan pelepasan kesemua 11 hakmilik dan bank tersebut membalas dengan mengarahkan peguamcara mereka dalam surat bertarikh 13 Jun 1987 untuk menyediakan pelepasan gadaian ke atas 11 hakmilik itu. B

Perayu-perayu kemudiannya mengikat perjanjian jualan yang baru dengan pembeli lain untuk menjual enam hak milik di antara 16–20 Jun 1987. Jualan-jualan ini sekali lagi terbantut kerana bank tersebut gagal untuk melepaskan bebanan ke atas tanah itu. Perayu-perayu kemudiannya disaman oleh beberapa pembeli. C

Perayu-perayu menyaman bank tersebut kerana secara salah di sisi undang-undang menahan pelepasan bebanan ke atas hakmilik-hakmilik itu, menyatakan bahawa tindakan ini telah menjadikan mustahil bagi perayu-perayu untuk mengumpulkan pembiayaan perantaraan yang cukup untuk menyiapkan Fasa III projek itu yang menjamin keuntungan bagi mereka ke atas projek itu. Kemudahan yang dilanjutkan oleh bank tersebut hanya mencukupi untuk menyiapkan Fasa I dan II. Mereka menghujahkan bahawa bank tersebut mengetahui pada masa mereka meluluskan kemudahan overdraf yang baru dan bersetuju untuk melepaskan hakmilik-hakmilik itu, bahawa ini adalah untuk membolehkan perayu-perayu untuk membiayai projek itu dan oleh itu boleh meramalkan kerugian yang akan diakibatkan kepada perayu-perayu jika pelepasan bebanan dilambatkan. Sebagai tambahan, perayu-perayu menghujahkan bahawa surat bertarikh 20 Jun 1983 daripada bank tersebut sepatutnya dibaca sebagai akujanji untuk melepaskan hakmilik spesifik bebas daripada bebanan. Hakim perbicaraan membenarkan tindakan itu dan memerintahkan bahawa penaksiran kerugian dibuat. D E F G

Penolong kanan pendaftar memutuskan bahawa bank tersebut perlu membayar kepada perayu-perayu RM3,401,820 bagi keuntungan yang diramalkan yang mungkin didapati oleh perayu-perayu jika tidak kerana kegagalan bank tersebut untuk melepaskan gadaian ke atas 11 hakmilik itu sejak 13 Jun 1987, tambahan 30% daripada keuntungan bersih yang diramalkan untuk keaiban yang dialami oleh perayu-perayu dan faedah 8% bersama dengan kos. Penolong kanan pendaftar menolak tuntutan-tuntutan untuk kerugian lain yang dikatakan dialami apabila perayu-perayu disaman oleh berbagai pihak ketiga, seperti arkitek dan lain-lain terhadap enam hakmilik bagi jumlah yang dikatakan terhutang. H I

Bank tersebut membuat rayuan terhadap jumlah yang ditaksirkan untuk dua jenis kerugian itu, dan perayu-perayu membuat rayuan terhadap penolakan tuntutan mereka untuk gantirugi apabila disaman

oleh pelbagai pihak ketiga. Dalam rayuan itu, Mahkamah Tinggi memerintahkan pada 27 Ogos 1994 bahawa perayu-perayu berhak kepada gantirugi berikutan dengan kemungkiran bank tersebut dalam melaksanakan akujanji untuk melepaskan 11 hakmilik itu bebas daripada bebanan, tetapi bahawa pengiraan gantirugi yang diasaskan kepada kehilangan keuntungan disebabkan oleh kelewatan itu adalah terlalu luar duga atau tidak dibuktikan. Rayuan bank dibenarkan, perintah penolong kanan pendaftar diketepikan, dan jumlah sebanyak RM5,000 diganti sebagai gantirugi nominal yang dialami oleh perayu-perayu, dengan faedah sebanyak 8% setahun daripada tarikh perintah kepada tarikh realisasi. Pendapat penolong kanan pendaftar berkenaan dengan kerugian lain yang dialami oleh perayu-perayu ditangan pelbagai pihak ketiga disahkan.

Perayu-perayu membuat rayuan kepada Mahkamah Rayuan terhadap kecukupan gantirugi yang diperolehi.

Diputuskan, menolak rayuan:

(1) Seksyen 74(1), (2) Akta Kontrak 1950 ('Akta tersebut') adalah berdasarkan peraturan dalam *Hadley v Baxendale*. Seksyen 74(1) merangkumi keadaan di mana kerugian yang dialami timbul semula jadinya daripada kemungkiran. Seksyen 74(2) merangkumi keadaan di mana pihak-pihak pada masa mengikat kontrak sedar bahawa kerugian adalah berkemungkinan sebagai akibat daripada kemungkiran kontrak itu. Sebagai tambahan, ganti rugi di bawah kedua-dua tajuk tidak boleh terlalu luar duga atau tidak langsung (lihat ms 653I dan 654A–D).

(2) Kerosakan kepada perayu-perayu oleh sebab kelewatan bank dalam melepaskan bebanan hanyalah sampai ke tahap bahawa perayu-perayu tidak boleh memindah hakmilik-hakmilik bebas daripada bebanan. Ia tidak boleh melampaui had ini kerana mengumpulkan wang tambahan tidak melibatkan dan tidak dikawal oleh bank. Perayu-perayu adalah bebas untuk mengumpulkan wang dengan gadaian lanjut hakmilik-hakmilik itu walaupun ianya mempunyai bebanan. Bank tersebut tidak boleh dijangkakan untuk mengetahui bagaimana perayu-perayu berhasrat untuk menambahkan pembiayaan perantaraan tambahan (lihat ms 655H–I); *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 dibeza.

(3) Tidak ada apa yang salah dengan pendapat hakim perbicaraan bahawa harta berkenaan bertambah nilainya di antara 1987 dan 1992, kerana terdapat bukti yang tidak dicabar bagi maksud ini dalam laporan penilaian bank tersebut. Oleh itu, kehilangan keuntungan bukannya akibat semula jadi dan akibat langsung daripada kemungkiran bank tersebut dan pendapat hakim perbicaraan bahawa pampasan yang dituntut di bawah bahagian pertama s 74(1) Akta tersebut tidak dapat dipertahankan patut disahkan (lihat ms 656F–G); *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76 dibeza.

(4) Di bawah bahagian kedua s 74(1) Akta tersebut, bank tersebut tidak mempunyai pengetahuan khusus pada masa mengikat kontrak tentang kemungkinan kerugian sebagai akibat daripada kegagalan mereka untuk melepaskan bebanan ke atas hakmilik-hakmilik itu. Surat bertarikh 26 April 1983 menyebut mengapa perayu-perayu menghendaki enam hakmilik itu dilepaskan tetapi gagal untuk menyatakan sebab bagi jualan hakmilik-hakmilik itu adalah untuk mengumpulkan wang tambahan bagi projek itu. Surat itu ada menyatakan bahawa pelepasan itu mesti dibuat serta-merta, dan bank tersebut melepaskan hakmilik-hakmilik itu dua hari selepas surat bertarikh 20 Jun 1983. Tindakan lanjut perayu-perayu, sebagai contoh, menunggu sehingga empat tahun sebelum menulis kepada bank tersebut sekali lagi untuk pelepasan serta-merta bebanan itu menyokong kemungkinan bahawa bank tersebut pada mulanya adalah tersilap tentang hasrat dan tujuan sebenar yang menyelubungi pelepasan 11 hakmilik itu, dan oleh itu bank tersebut tidak dapat meramalkan apa-apa kerugian yang mungkin akan terjadi oleh sebab kelewatan itu. Oleh itu, perayu-perayu tidak boleh mengasaskan kerugian mereka kepada bahagain kedua s 74(1) (lihat ms 657E–G dan 658B–F).

(5) Bank tersebut walaubagaimana pun gagal untuk melepaskan bebanan untuk lebih daripada empat tahun selepas arahan 13 Jun 1987 kepada peguamcara mereka, dan mesti bertanggunjawab kepada perayu-perayu untuk apa-apa kerugian atau kerosakan yang dialami oleh mereka semasa tempoh ini. Pengiraan kerugian atau kerosakan ini tidak boleh diperluaskan kepada kehilangan keuntungan yang disebabkan oleh ketidakupayaan perayu-perayu untuk menyiapkan Fasa III projek tersebut kerana kerugian itu bukan akibat semula jadi daripada kemungkiran bank tersebut dan ia tidak dapat diramalkan. Kerugian patut dihadkan kepada gantirugi nominal sahaja, dan penaksiran hakim perbicaraan adalah betul (lihat ms 658G–I).

(6) Dalam apa keadaan sekalipun, perayu-perayu adalah di bawah beban untuk membuktikan jumlah keuntungan bersih yang diramalkan yang hilang dan mereka tidak dapat berbuat demikian. Laporan kebolehlaksanaan mereka telah hilang semasa banjir dan bukannya terpulang kepada bank tersebut untuk mengemukakan dokumen ini. Perayu-perayu gagal untuk memanggil pembuat laporan itu, dan saksi yang dipanggil untuk mengemuka keterangan sekunder bagi laporan itu tidak berkelayakan untuk berbuat demikian, kerana tidak ada bukti bahawa beliau pernah membaca laporan itu (lihat ms 659B–D, I dan 660A).

(7) Keputusan hakim perbicaraan bahawa tuntutan-tuntutan lain oleh kontraktor, arkitek dan lain-lain adalah terlalu luar duga untuk dituntut terhadap bank tersebut adalah betul. Tidak ada bukti bahawa tuntutan-tuntutan pihak ketiga ini perlu dibayar (lihat ms 660I).]

Notes

For cases on breach, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1185–1242.

Cases referred to

Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76 (distd)

Hadley v Baxendale (1954) 9 Exch 341 (refd)

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528 (distd)

Legislation referred to

Contracts Act 1950 s 74(1), (2)

Evidence Act 1950 s 63(e)

Appeal from: Originating Summons No 24–132–89 (High Court, Kuala Terengganu)

Cecil Abraham (*RS Nathan* and *B Thangaraj* with him) (*Thangaraj & Associates*) for the appellants.

Ambiga Sreenevasan (*Peter Pereira* with her) (*Skrine & Co*) for the respondent.

Cur Adv Vult

Siti Norma Yaakob JCA (delivering the judgment of the court): Proceedings in this appeal began in Kuala Terengganu by way of Originating Summons No 24–132–89 and the factual matrix insofar as they are relevant to this appeal are as follows.

In May 1979, the appellants purchased a piece of property known as Lot 1233, EMR 892, Mukim of Batu Buruk, Kuala Terengganu, Terengganu for the sum of RM785,000. They had every intention of developing the land which covers an area of about five acres, into a housing estate known as Taman Teratai and to finance the purchase as well as the development, they applied for an overdraft facility of RM1.5m from Bank Bumiputra (M) Bhd, the respondent ('the bank'). The facility was approved by the bank on 28 June 1979 subject to, inter alia, the following terms and conditions:

(1) RM670,000 of the facility was to be utilized by the appellants to settle 85% of the purchase price of the land with the appellants meeting the balance of 15% of the purchase price amounting to RM115,000.

(2) The balance sum of RM830,000 of the facility was to form the bridging finance for the construction of 66 units of residential and

commercial buildings comprising 53 units of terrace houses, 6 units of detached houses and 7 units of shophouses. A

(3) The facility was secured by a first legal charge over the land.

(4) The facility was to be repaid within 2½ years of the first drawdown of RM200,000.

B

To enable construction of the 66 units of residential and commercial buildings, the land was subdivided into 66 lots on or about 26 October 1982. Pending this subdivision and approval for conversion, no building was constructed on the land during the first 2½ years after the facility was granted, and by 1983, when the appellants realized there were insufficient funds to construct the buildings (as the bridging finance was utilized to C service the interests that had accrued), they applied to the bank by letter dated 2 January 1983, for an extension of the facility for another 24 months and an increase of another RM1m of the bridging loan. In the same letter too, the appellants revised the number of buildings to be constructed on the land by reducing it to 57 units made up of 16 units of D two-storey semi-detached houses and four units of two-storey bungalows for Phase I, 28 units of two-storey terrace houses for Phase II, and nine units of 3½ storey shop houses for Phase III.

On 28 March 1983, the bank approved the extension and additional facility and, inter alia, cancelled the earlier overdraft facility of RM1.5m and replaced it with an overdraft facility of RM2.5m. The additional E bridging finance of RM1m was for the construction of the reduced number of 55 units of residential and commercial buildings and this was to be secured by the personal guarantees of the appellants as well as a second legal charge over the same land.

It is the appellants' contention that at the time when the extension F and additional financing was approved, the bank was aware that the additional RM1m was insufficient to meet the costs of construction which was estimated at RM1.4m. To overcome the shortfall, the bank agreed to release six titles of the subdivided lots unconditionally to enable the appellants to sell them as vacant lots thereby generating the balance of the G bridging finance on their own. At the same time, the bank also agreed to surrender five more titles to the government by way of compulsory acquisition. This may well explain why the number of residential and commercial units approved for construction was reduced from the original 66 units to 55 units.

H

As the fact of the new arrangements did not appear in the bank's letter of approval dated 28 March 1983, the appellants followed it by a letter dated 26 April 1983 written by a company of which the first appellant was the managing director, seeking the immediate release of the six titles without any redemption payment. The bank responded by confirming that the request for release was approved in a letter dated 20 I June 1983. It is this letter which subsequently formed the basis of the appellants' claim against the bank in the originating summons.

Following the new arrangements reached in 1983, the appellants then entered into a sale and purchase agreement with one En Osman bin

Abdul Ghani who agreed to purchase the six titles for RM380,000 together with the other terms and conditions contained in a letter dated 29 May 1983. Under the agreement, unencumbered ownership of the six titles was to pass to the purchaser within six months from 29 May 1983 and in the event the sale could not proceed, the deposit of RM95,000 paid by the purchaser would be refunded within seven days of the end of the six-month period together with a penalty of 50% and interest of 15%.

The sale was subsequently aborted as the appellants were not able to pass clear titles of the six properties to the purchaser within the time stipulated in their agreement as the bank did not discharge the charges on the six titles. No reason is given why the bank had delayed in the matter and it protracted until 11 June 1987 when the appellants wrote to the bank seeking the release of all the 11 titles and the bank responded by instructing its solicitors to prepare a discharge of the charges over the 11 titles in a letter dated 13 June 1987.

Following this, the appellants entered into fresh sale and purchase agreements with different purchasers to sell the six titles. These included the sale and purchase agreement dated 16 June 1987, entered into with one En Zainuddin bin Mohd Nor, whereby the latter agreed to purchase one lot for RM75,000. Another sale and purchase agreement dated 20 June 1987 entered into with Haji Awang Sdn Bhd evidenced the sale and purchase of another lot for RM90,000. A third sale and purchase agreement dated 16 June 1987 was executed with one Puan Hendon bte Tahir whereby the latter agreed to purchase one lot for RM75,000. There is mention of a fourth purchaser by the name of Abu Hanifah Nordin, but there is no supporting sale and purchase agreement to evidence such sale. There is also reference to two other purchasers but no details or particulars of the sales made to them are available from the appeal records.

Like the first sale, the subsequent sales were also aborted for the same reason that the appellants were not able to pass clear titles without encumbrance to the purchasers as the bank had failed to execute the discharge of charges of the titles and as a result, the appellants were sued by some of the purchasers.

On 10 September 1989, the appellants filed the originating summons that we had alluded to earlier on against the bank for unlawfully withholding the discharge of charges in respect of the 11 titles. The appellants contended that because of the bank's omission to discharge the charges over the 11 titles, they could not on their own raise sufficient bridging finance to complete Phase III of the project that would have assured them of the profits over the project. It is this loss of profits that the appellants feel very sore about as the facility extended by the bank was only sufficient to complete Phases I and II.

In their originating summons, the appellants seek the following remedies:

(1) a declaration that they, the appellants, are the lawful owners of the 11 titles particulars of which are clearly set out in the summons and that the bank had unlawfully withheld the execution and delivery of the discharge of charges of the said titles since 13 June 1987, the date

when the bank gave its written instructions to its solicitors to prepare the discharge of charges over the 11 titles; A

(2) a proper officer of the bank do execute the discharge of charges of the said titles and deliver them to the appellants within two weeks of the date of the order to be made failing which the senior assistant registrar ('the SAR') be empowered to execute the discharge of charges on behalf of the bank; B

(3) damages to be assessed and be paid by the bank to the appellants for unlawfully withholding the unconditional release of the aforesaid titles;

(4) costs; and C

(5) any other relief as the court deems fit.

On 10 August 1991, Ahmad Fairuz J (as he then was) allowed with costs the appellants' originating summons in terms prayed for and the learned judge also ordered that damages suffered by the appellants be assessed and paid for by the bank for unlawfully withholding the discharge of charges D over the 11 titles.

The bank appealed against the order but the appeal was subsequently withdrawn thereby allowing the assessment of damages to be proceeded with by the SAR. This was done over a period of five days when eight witnesses testified for the appellants. The bank did not call any witness. E

On 9 July 1992, the SAR ordered that the bank pay the appellants:

(1) RM3,401,820 being the projected net profits that the appellants would have made but was in fact lost as a result of the bank's failure to discharge the charges of the 11 titles since 13 June 1987;

(2) RM1,020,546 representing 30% of the projected net profits for the F shame suffered by the appellants at the hands of the bank;

(3) interest at 8% pa on the judgment sums with effect from 28 March 1986 to date of realization; and

(4) costs.

G

In the proceedings for assessment, the SAR had also rejected the appellants' claims for other damages allegedly suffered by them when they were sued by various third parties that included their architects, their project manager, their contractors and the various purchasers of the six titles for various sums allegedly due from the appellants.

H

Both the bank and the appellants appealed against the order of the SAR and in the case of the bank, it is against the amounts assessed for the two heads of damages awarded to the appellants, and in the case of the appellants, it is against the dismissal of their claims for damages when they were sued by the various third parties.

On 27 August 1994, Mohd Saari Yusoff J found that although the I appellants were entitled to damages following the bank's breach in delaying its undertaking to perform to release the 11 titles free of encumbrances, the measure of such damages based on the loss of profits caused by the

A delay was either not proved or too remote and to that end allowed the bank's appeal, set aside the order of the SAR and substituted a sum of RM5,000 being the nominal damages suffered by the appellants with interest at the rate of 8% pa from 27 August 1994 to date of realization. The learned judge also ordered that the costs of the proceedings before him and the SAR be borne by each party. Although the learned judge B made no specific order on the appellants' cross-appeal, a reading of his judgment reveals that he had confirmed the SAR's finding in disallowing the appellants' claim for the other damages suffered at the hands of the various third parties that had sued them. It would appear that the appellants' cross-appeal was dismissed, although no specific order to that effect was C made.

We are now asked to consider whether the order of court dated 27 August 1994 has been correctly made and this must be confined to the adequacy of the damages suffered by the appellants resulting from the bank's delay in failing to discharge the charges over the 11 titles. Such D discharge was only effected in May 1992.

At the outset of the hearing before us, Mr Cecil Abraham, counsel for the appellants, intimated that he was not proceeding with the second head of damages awarded by the SAR, this being the so-called damages for shame suffered by the appellants as on the facts of this case, such a claim E cannot be maintained in law. That left us with the following issues:

(1) Whether the trial judge was correct in his interpretation of the provisions of s 74(1) and (2) of the Contracts Act 1950 ('the Act') in that the appellants' claim for damages did not fall within any of the two limbs of s 74(1).

F (2) Whether the trial judge was right in law in awarding nominal damages only.

(3) Whether the trial judge had erred in law when he failed to consider the appellants' notice to produce the feasibility report which formed the basis of the computation for the loss of profits.

G

Before dealing with these issues, we remind ourselves that there are two independent contracts existing between the parties to this appeal. The first is the contract for the facilities, the terms of which are contained in the bank's letter of approval dated 28 March 1983 and which are not in issue before us. The other contract is the bank's undertaking given in its letter H dated 20 June 1983 which the appellants maintained should be read to mean not only an undertaking to release specific charged titles immediately, but to free such titles of any encumbrance as requested for by the appellants for the purpose of enabling the appellants to sell such unencumbered titles to raise the additional bridging finance of RM400,000 independently of I the bank. It is in respect of the breach of this second contract of undertaking which we say is subsidiary to the principal contract for the facilities that the appellants' cause of action is founded and in law, the compensation payable for such a breach is governed by the provisions of s 74(1) and (2)

of the Act which restate the rule in *Hadley v Baxendale* (1954) 9 Exch 341 and that section reads as follows:

> Compensation payable for loss or damage caused by breach of contract.
>
> 74 (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

There are two limbs to s 74(1) under which compensation becomes payable to the injured party. The first covers the situation when the damage or loss caused to the injured party arose naturally in the usual course of things from the breach. The second situation is met when the parties to the contract were fully aware at the time the contract was entered into that damage or loss is likely to result from the breach of it. In either situation, the compensation claimable must not be indirect or too remote.

The learned trial judge held that the ingredients of the first limb of s 74(1) have not been met by the appellants as the evidence shows that the market value of the 11 titles had increased in value by nearly RM100,000 during the five-year period from 13 June 1987 (when written instructions to prepare the discharge of charges were directed by the bank to its solicitors) to May 1992 (when the discharge of the charges was in fact effected). As such, the appellants suffered no loss arising naturally from the bank's breach in delaying to discharge the charges.

Likewise, the learned trial judge found no evidence to substantiate the appellants' contention that it was within the contemplation of the parties that at the time the bank agreed to discharge the titles, loss of profit would result to the appellants should there be a delay in doing so.

It is the appellants' submission that their loss of profit could come under the first limb of s 74(1) on the authority of the Supreme Court case of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76. In that case, the Supreme Court affirmed the finding of the trial judge that the appellant bank had committed a breach of the overdraft facilities arrangements Mae Perkayuan, the first respondent, had with the appellant bank by prematurely withdrawing such facilities for non-payment of interests on the sums disbursed by the appellant bank. The reasoning behind that finding was that the appellant bank 'was not entitled to issue the recall letter purely on the ground that interest had not been serviced by the first respondent because the first respondent is not obliged under the agreement to pay interest during the bridging period'. When considering the measure of damages that the appellant bank had to pay the Supreme Court had this to say at p 89 of the report:

A We are, therefore, of the view that the loss of profits on the housing project which the first respondent would suffer was the natural and probable result of the breach of agreement by the bank, and when the bank agreed to provide the bridging finance to the first respondent, the bank well knew of the loss that the first respondent would incur should the bank break the contract.

B We do not for one moment doubt the soundness of that ruling, but the facts of *Mae Perkayuan*'s case are distinguishable in that only one agreement was involved between the parties, namely the arrangements for the granting of secured overdraft facilities for a fixed period of four years. By recalling the facilities mid-term when the agreement had still about 8½ months to C run, the natural and probable result of such a breach is the loss of the profits suffered by Mae Perkayuan.

The facts of the appeal before us are somewhat different and as indicated earlier on, there are two independent contracts existing between the parties, the principal one being the contract for the facilities and the D subsidiary one being the undertaking to discharge the charges on the 11 titles. If the principal contract had been breached, we have no hesitation in concluding that the appellants had suffered loss of profits as that would have been the natural and direct consequence of the breach. However, the breach that we are concerned with is not the breach of the principal E contract, but the breach of the subsidiary contract, namely the delay in executing and effecting the discharge of the charges. Mr Cecil Abraham whilst appreciating that the nature of the breach in *Mae Perkayuan* is different from the one before us, nonetheless urged us to follow the reasoning given in *Mae Perkayuan* by way of a distinct analogy. We, however, cannot agree with him on this for the following reasons.

F In *Mae Perkayuan*'s case, the purpose of the appellant bank extending the facilities was to provide financial assistance to Mae Perkayuan in its development projects. The manner in which such financial assistance is to be provided particularly in the disbursement of the funds is in the complete control of the appellant bank, subject if any, to the terms that have been G agreed to with Mae Perkayuan. Thus, when the appellant bank decided to withdraw the facilities prematurely, Mae Perkayuan was left high and dry and the direct and natural consequence of the appellant bank's conduct was Mae Perkayuan's inability to proceed with its project and depriving it of the profits it would have made had the facilities been made available.

H In our case, however, the breach committed by the bank caused a delay in the appellants' attempts to transfer the titles free of encumbrances to third party purchasers of such titles. The harm caused to the appellants cannot go beyond this as raising the additional funds was very much the appellants' own efforts and the bank was in no way involved in that exercise. The bank had no control over just how the appellants decide to I use the titles to raise the additional funds. This is so as the titles had been in the appellants' possession since 22 June 1983, and the fact that the titles were encumbered is no bar to the appellants to charge the titles further to secure the additional funds.

Our attention was also drawn to the case of *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, where it was held that the defendants, an engineering company, with knowledge of the plaintiffs' business, having promised delivery by a particular date of a large and expensive boiler, could not reasonably contend that they could not foresee that loss of business profit would be liable to result to the purchaser from a long delay in delivery.

We consider that the decision of the English case is not of much assistance to our case, as the bank cannot be expected to know just how the appellants intend to go about raising the additional bridging finance. In any event, the facts of *Victoria Laundry* were such that the defendants were not only aware of the nature of the plaintiffs' business but had also been informed by letter that the plaintiffs intend to put the boiler to use in the shortest possible space of time. There is no such equivalent evidence before us other than the first appellant, PW8, testifying orally that he had informed the bank that he needed the titles to be discharged urgently for the purpose of conveying clear titles to prospective purchasers. Correspondence passing from the appellants to the bank never expressed such urgency and this is borne out by the fact that after the bank had agreed to release the titles as contained in its letter dated 20 June 1983, nothing more was heard of the matter until almost four years later when the appellants wrote the letter dated 11 June 1987, inquiring about the release and complaining that they had been hardpressed by the purchasers and authorities. There is no mention that the delay had jeopardized the business profits that they would have made.

Likewise, we find nothing wrong with the trial judge's finding that between 1987 to 1992, the value of the properties had enhanced as there is evidence to that effect in the valuation report produced by the bank, which was admitted unchallenged.

On the facts of this case, we consider that the loss of profits claimed by the appellants is not the natural and direct consequence of the bank's breach and to that end we confirm the learned trial judge's finding that the compensation claimed under the first limb of s 74(1) of the Act is not tenable.

We now turn to the second limb of s 74(1) of the Act, for which the appellants must show that the bank had the requisite knowledge that the 11 charged titles were to be released free of any encumbrance to enable the appellants to sell six of such titles as housing lots so that the proceeds so acquired would form the much needed additional funds for Phase III of the project. It is the communication of these special circumstances surrounding the release of especially the six titles that form the basis and essence of the second limb of s 74(1). Is there any evidence that the special circumstances had been communicated to the bank?

Before the SAR, the first appellant, PW8, testified as follows. In early 1983, he met one of the bank's officers, En Hashim Shamsuddin and requested for an additional bridging finance to continue with Phase III of the project. It was following this meeting that he made the formal application

for the additional bridging loan of RM1m as contained in his letter dated 2 January 1983 to which was annexed a detailed feasibility report. Three subsequent meetings followed after this as the bank was not satisfied that the additional bridging loan of RM1m requested for was sufficient to complete Phase III. The bank reckoned that at least another 30% financing amounting to RM400,000 was required to cover the construction costs. PW8 had explained to the bank officers that he was not prepared to borrow an additional RM1.4m as that would place him in the position of settling high interest payments, and to minimize his liability, he had then suggested that the bank release six titles unconditionally so that he can sell them to raise the additional RM400,000 on his own. He had then concluded his oral testimony on the particular meeting when this suggestion was made as follows:

> It is for that reason that the bank approved RM1m and not RM1.4m which was required. Bank approval vide letter dated 28 March 1983.

PW8's oral testimony was given nine years after the events had taken place and as such it must be tested against the contemporaneous documents produced in the proceedings for assessment.

The bank's letter of approval dated 28 March 1983 running into six pages makes no mention about releasing any title or using such titles to raise the additional bridging finance. However, in his subsequent letter dated 26 April 1983 addressed to the bank, PW8 did mention the fact of the discussion about the release of the six titles, particulars of which are stated in his letter for the purpose of either selling them as housing lots or meeting the requirement of the government for infrastructure purposes. No mention is made that the reason for the sale is to raise the additional funds for the project although mention is made that the charges over the six titles would have to be discharged immediately. The bank's response to this request is contained in its two-sentence letter dated 20 June 1983 wherein the request for the release of the titles which could not be developed is approved. It was pursuant to this letter that the bank released the titles to PW8 two days later on 22 June 1983 and the titles had been with him throughout.

After 22 June 1983, nothing more was heard about the status of the 11 titles until 11 June 1987, when PW8 wrote to the bank and we reproduce the pertinent parts of his letter that read as follows:

> I respectfully refer you to the above titles which should have been released long time ago. However, inspite of my reminders and requests you have failed, or neglected to release them.
>
> Your letter of approval MGM/JU/zs/3928 dated 20 June 1983 refers. As the matter is long overdue and I have been hardpressed by the purchasers and the authorities concerned I therefore give notice that the above grant must be released within 8 (eight) days of this letter failing which you shall bear all the consequential loss arising from your neglect or failure to do so.
>
> Further, I am to intimate that the above grants are already in my safe custody.
>
> Thanking you in anticipation for immediate attention and action.

It was following this letter that the bank instructed its solicitors by letter dated 13 June 1987 to prepare the necessary documentations to discharge the charges over the 11 titles.

We pause here to consider the effect of the correspondence passing between the parties. We cannot but detect the possibility that initially the bank may well have been mistaken as to the true intent and purpose surrounding the release of the 11 titles. That belief can be gauged from the following factors. To begin with all negotiations for the additional bridging loan were made between the parties without the aid of any independent legal advice. No complaint is made by the appellants as to any loss suffered by them during the period 1983 to 1987 when the titles still remained encumbered. For that matter, there is no evidence of any communication coming from the appellants to show the urgency of having the charges of the 11 titles discharged. It must also be remembered that in 1983, following the bank's approval to release the six titles, the appellants had immediately entered into a sale and purchase agreement, the terms of which are contained in the letter dated 29 May 1983, with one En Osman bin Abdul Ghani who had agreed to purchase all six titles for RM380,000. That sale was aborted subsequently due to the appellants' failure to pass clear titles of the properties to the purchaser which in turn was caused by the bank's failure to discharge the charges. Since delay was the root problem caused by the bank's failure to take immediate action to discharge the charges and that delay had persisted since 20 June 1983 when the bank wrote approving the release, the appellants had kept quiet until June 1987 when they finally complained of such delay and the bank responded by instructing its solicitors to prepare the discharge. From the conduct of the parties, it would appear that there may well have been a miscommunication as to the true intent and purpose of the release of the 11 titles sought by the appellants and for which the bank cannot be said to be able to forsee any loss that was likely to occur. It is this factor that affirms our finding that the element of communication of special circumstances is absent to enable the appellants to base their loss on the second limb of s 74(1).

Despite the appellants' failure to come within the provisions of s 74(1) of the Act, the fact still remains that the discharge of the charges was only effected by the bank in May 1992, a delay of more than four years from the time the bank instructed its solicitors to do so in June 1987. It is this delay which the bank has been found accountable to the appellants for any loss or damage suffered by them during that period, but the measure of such loss or damage cannot extend to the loss of profit resulting from the appellants' inability to complete Phase III of the project. We say such loss is not the natural consequence of the bank's breach and on the facts of this appeal, it is not a foreseeable loss, but an indirect one. Nonetheless, the appellants are entitled to the loss suffered caused by the bank's delay in executing the discharge of charges which resulted in the appellants inability to transfer clear titles of the encumbered properties to their purchasers, but such loss must be limited to nominal damages only. In this respect, we consider that the learned trial judge made a correct finding in law when he confined the appellants' loss to nominal damages only and

rejected their claim that they are entitled to the project net profits of RM3,401,820 as awarded by the SAR.

Even if we are wrong in this, the appellants still have to prove the amount of the projected net profit that they had lost. The calculations for such projected net profits are found in the appellants' feasibility report that was attached to P8, their letter dated 2 January 1983 applying to the bank for an extension and increase of the first bridging loan. As such, they depended on the report to prove the amount of their loss, but unfortunately they could not produce it as they had lost their copy in a flood. Much was made by the appellants of the bank's failure to produce the report after a notice to produce dated 17 February 1992 was served on the bank and the learned judge's omission to consider this in his judgment. It is our opinion that the appellants have no cause to complain about this as the burden of proving the amount of loss suffered lies with the appellants throughout. In any event, since the learned judge had already decided that the loss suffered by the appellants can only be nominal in nature, the omission to consider the failure to produce the report had become a non-issue. In the absence of the report, the maker was also not called to testify, neither was he identified. Instead, PW8 — in an attempt to lead secondary evidence of the contents of the report — referred to P8, which mentioned the expected income to be derived from the project.

The right to adduce secondary evidence is governed by the provisions of the unamended s 63(e) of the Evidence Act 1950 as the amendment to that subsection came into effect in 1993, after the proceedings for assessment.

The unamended s 63(e) reads as follows:

> 63 Secondary evidence includes —
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) oral accounts of the contents of a document given by some person who has himself seen it.

The effect of s 63(e) has been clearly stated by *Sarkar's Law of Evidence* Vol 1 at p 957 to be as follows:

> Under this clause, it is necessary that the person giving oral accounts of the contents of a document must have himself seen the original document and not a copy. 'Seen' means 'read' [*Ma Mi v Kallander*, infra] 'A person who proposes to testify to the contents of a document, either by copy or otherwise, must have read it. He may not describe its contents merely on the credit of what another has told him it contains, even though his informant purports to have read it aloud in his presence.

It is clear that before secondary evidence of a document can be made admissible, there must be some ground work to establish that the witness giving such evidence had not only seen the original document in question

but had also read it. In this case, there is no such evidence led to show that PW8 (the only witness who testified to the amount of the loss) had seen and read the feasibility report. Giving evidence on P8 is not giving evidence of the contents of the feasibility report for which we say PW8 was unqualified to testify. For that matter too, we cannot accept the computation of loss of profits tendered by Mr Cecil Abraham as the alternative to the projected net profits as compiled by the feasibility report as the former did not come by way of evidence.

Finally, we come to the consequential losses suffered and claimed by the appellants when they were sued by third parties for various sums allegedly due from the appellants. We start with the purchasers of the six released lots who have been identified to be:

(1) Osman bin Ghani
(2) Abu Hanifah Nordin
(3) Zainuddin bin Mohd Nor
(4) Hj Awang Sdn Bhd
(5) Hendon bte Tahir

The sale of the six lots to Osman bin Ghani, PW1, was made in 1983 and since the appellants are claiming for losses suffered in 1987, whatever losses the appellants had suffered at the hands of PW1 cannot be maintained. In any event, PW1 had testified that he had settled his claim with the appellants.

Abu Hanifah Nordin did not testify before the SAR and whatever claim he had against the appellants was admitted by PW8 to have been settled by the bank. As such, the appellants suffered no loss.

The claims of both Zainuddin Mohd Nor and Hj Awang Sdn Bhd against the appellants are still pending in the Klang and Shah Alam Sessions Courts respectively and as such, the damages allegedly suffered by the appellants have not yet crystallized.

As for the purchaser, Hendon bte Tahir, PW8 has admitted that she did not file any action against him.

As for the other claims made by:

(1) Akitek Indahreka, the project's architects for their fees;
(2) Mohd Anuar & Co, the project manager also for their fees;
(3) Mae Bina Sdn Bhd, the main contractors for their construction costs; and
(4) Chee Kie Cheong, the sub-contractor for his subcontract works,

we consider such claims to be too remote to be claimable against the bank. For this reason and the fact that the claims of the third parties have not been proven to be due, we confirm the judge's findings that such claims cannot be maintained.

A For the reasons that we have given, we dismiss this appeal with costs. We confirm the findings of the trial judge and we order that the deposit be paid to the respondent bank to account of its taxed costs.

Appeal dismissed.

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Reported by K Tang-Wai

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